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IN THE

Supreme Court of the United States

October Term, 1967

NO. 790

BRASWELL MOTOR FREIGHT LINES, INC., CLARINDA K. SHAYLER, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, TRANSCON LINES, ET AL.,
Appellees

On Appeal From The United States District Court For The Western District of Texas

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) appellee Transcon Lines moves that the judgment of the District Court be affirmed because it is manifest that the question presented is so unsubstantial as not to need further argument.

STATEMENT

The judgment of the three-judge District Court sought to be reviewed on this appeal incorporates the District Court's opinion (Appendix A to Jurisdictional Statement and 1966-1967 F.C.C. ¶81,938). The opinion of the District Court accurately states the

nature of the case, quotes the statutes involved and clearly discusses and disposes of the only question presented by the appeal (designated as "the crucial question" and "the core of the case" in the Jurisdictional Statement at pages 9-11). A complete statement of the pertinent and undisputed findings of fact by the Commission concerning the nature and extent of applicants' past services and the new service to and from California and Arizona that would result from unconditional approval (Appendix B to the Jurisdictional Statement at B-22 to B-25 and 101 M.C.C. at 14-16) is specifically incorporated by reference into the District Court's opinion as are the Commission's basic findings and reasons for imposing the disputed approval condition which would prohibit new service to and from California and Arizona (Appendix B to Jurisdictional Statement at B-26 to B-27 and 101 M.C.C. at 16-17).

THE QUESTION PRESENTED

In determining whether a unification proposed under Section 5(2) of the Act, 49 U.S.C. §5(2), is or is not consistent with the public interest is the Commission without authority to condition its approval so as to prohibit authorization of new competitive services not shown to be required by public need?

ARGUMENT

The judgment of the District Court affirming the Commission's order is clearly correct for the reasons therein stated. Section 5(2)(b), 49 U.S.C. §5(2)(b), authorizes approval of transactions covered thereby

on a limited and conditional basis if a limited approval rather than a full approval is all that is shown to be consistent with the public interest and further provides that if a given transaction is found only in part to be consistent with the public interest the Commission

> ". . . shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modification, so found to be just and reasonable."

Essentially appellants argue that public need, or absence of public need, for a new competitive transportation service resulting from unification of existing certificates cannot be lawfully considered in determining consistency with the public interest because, appellants say, "public interest" as used in Section 5(2) has been defined in *McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370 (1944), or elsewhere, so as to make "public interest" and "public need" concepts and criteria mutually exclusive. Particularly, appellants say in substance that "public interest" has been restrictively defined to preclude consideration in a Section 5 case of whether new competitive services resulting from a unification would or would not be responsive to a public need for adequate service not available from existing carriers.

But the exact opposite is true. Long before the decision in *McLean* and long prior to Congress' express declaration of the National Transportation Policy[1]

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[1]54 Stat. 899, 49 U.S.C.A. note preceding Section 301 (". . . to promote safe, adequate, economical, and ef-

this Court had determined that the "public interest" concept of Section 5 has direct relation to "adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25, 53 S.Ct. 45, 48 (1932).

Accordingly, as pointed out by the District Court, in *Pacific Intermountain Express Co.—Control and Purchase—Keeshin Freight Lines, Inc.*, 57 M.C.C. 341, 380 (Full Com., 1950), *affirmed*, 57 M.C.C. 467 (Full Com., 1951), and in hundreds of Section 5 cases before and since, the Commission has found that the public interest required disapproval in whole or in part of a proposed unification where new competitive service would result without a showing that such resulting new service would be responsive to a public need for adequate service not being met by existing carriers.[2] In most of these cases, as in the present

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ficient service and foster sound economic conditions in transportation and among the several carriers . . . all to the end of developing, coordinating and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States. . . .")

[2]The following are representative of the Commission's consistent holdings (in addition to *North American*, 93 M.C.C. 125 (Div. 3, 1963), cited in the Commission report under review) requiring proof of public need in Section 5 cases to warrant either reactivation, transfer and unification or any other new competitive use of vendor's certificated rights. *Compare Crichton*, 35 M.C.C. 661, 664 (Div. 4, 1940) and *Quaker City*, 38 M.C.C. 603 (Full Com., 1942) *with*

case, the resulting and proscribed new service would have come about through reactivation of dormant or unused authority of the seller so as to provide a new single-line service in conjunction with the rights of

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Adkins, 38 M.C.C. 240, 243 (Div. 4, 1942); *Reinhardt*, 38 M.C.C. 665, 669 (Div. 4, 1942); *Falwell*, 40 M.C.C. 439 (Full Com., 1946), *affirmed*, *Falwell v. United States*, 69 F.Supp. 71, 6 F.C.C. ¶80,378 (W.D. Va., 1946), *aff'd per curiam*, 330 U.S. 807, 67 S.Ct. 1087 (1947); *La Mere*, 55 M.C.C. 501 (Div. 4, 1949); *Transcon*, 56 M.C.C. 521 (Full Com., 1950); *Shein*, 56 M.C.C. 711 (Div. 4, 1950), *affirmed*, *Shein v. United States*, 102 F.Supp. 320, 8 F.C.C. ¶80,734 (N.J., 1951), *aff'd per curiam*, 343 U.S. 944, 72 S.Ct. 1043 (1952); *Houff*, (not printed), *affirmed*, *Houff Transfer, Inc. v. United States*, 105 F. Supp. 851, 9 F.C.C. ¶80,800 (W.D. Va., 1952); *Cooper*, 58 M.C.C. 283 (Full Com., 1952); *Adley*, 65 M.C.C. 457, 493 (Div. 4, 1955); *Denver-Chicago*, 70 M.C.C. 309 (Div. 4, 1956); *Ratner*, 70 M.C.C. 251 (Div. 4, 1956), *affirmed*, *Ratner v. United States*, 162 F.Supp. 518, 12 F.C.C. ¶81,164 (S.D. Ill., 1957), *aff'd per curiam*, 365 U.S. 368, 78 S.Ct. 913 (1958); *C & H*, 80 M.C.C. 33 (Div. 4, 1959); *Kings*, 85 M.C.C. 110 (Full Com., 1960); *Red Star*, 87 M.C.C. 175 (Div. 4, 1961); *Bowman*, 90 M.C.C. 303 (Div. 3, 1961); *C & H*, 93 M.C.C. 741 (Div. 3, 1964), *affirmed*, *C & H Transportation Co. v. United States*, 249 F.Supp. 97, 16 F.C.C. ¶81,781 (N.D. Tex., 1965); *Hennis*, (not printed), *affirmed*, *Key v. United States*, 263 F.Supp. 544, 1966-1967 F.C.C. ¶81,876 (S.D. Ind., 1966); *Great Coastal*, 97 M.C.C. 271 (Div. 3, 1964), *affirmed*, *Great Coastal Express, Inc. v. United States*, 243 F.Supp. 943, 16 F.C.C. ¶81,753 (E.D. Va., 1965), *aff'd per curiam*, 382 U.S. 369, 86 S.Ct. 546 (1966); *Fober*, 97 M.C.C. 668 (Fin. R.B., 1965), *affirmed*, *Glosson Motor Lines, Inc. v. United States*, 271 F.Supp. 467, 1966-1967 F.C.C. ¶81,945 (M.D. N.C., 1967).

the purchasing carrier. The Commission's rationale in *Transcon* is typical.[3]

As noted, a number of these Commission decisions in Section 5 cases wherein the public interest was found to require total or partial disapproval on account of applicants' failure to prove public need for a proposed new unified service have been affirmed on review. The one case affirming the Commission's use of public need criteria to determine public interest which is most similar on its facts to the instant case was cited by the District Court below. *C & H Trans-*

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[3] *Transcon Lines—Purchase (Portion)—Anderson Motor Service Co.*, 56 M.C.C. 521, 555 (Full Com., 1950):

> "In our opinion, the evidence adduced from shippers in both proceedings indicates a prefeerence for the services of Transcon and O. K. Trucking, rather than a real need for the services, and is not a sufficient basis upon which to approve the transactions resulting in additional services. Carriers that have expended their funds and energies in developing and maintaining facilities to handle all available traffic are entitled to protection against the purchase of operating rights under which operations have been abandoned, for the institution of a new service in competition with them. Such protection should be afforded, not only for the protection of the carriers themselves, but also to promote stability and sound economic conditions in the industry and the rendition of adequate transportation service to the public."

portation Co. v. United States, 249 F.Supp. 97, 16 F.C.C. ¶81,781 (N.D. Tex., 1965).'

'In *C & H* the court observed in this connection (249 F.Supp at 99-100:

> "We hold that the evidence in the record clearly sustains the Commission's findings that the routes were dormant and that C & H Transportation Company failed to meet its burden of demonstrating operations by the vendor on those routes.
>
> "Once dormancy has been found, the purchasing carrier has the burden of proving a public need for his service in order to justify the reactivation of dormant routes. Logically, the Commission then requires the same degree of proof in an application to reactivate routes wholly unused as in this case as it would in an application for new routes. See Note, *Federal Regulation of Trucking: The Emerging Critique*, 63 Colum. L. Rev. 460, 489 n. 177 (1963). The purchaser's obligation here would be to 'demonstrate by shipper testimony that a need for additional service is present or immediately foreseeable—and, conversely, upon protest of authorized carriers, that the existing service offered is physically incapable of meeting shipper demands.' Note, *Federal Regulation of Trucking, supra*, 63 Colum. L. Rev. at 469. *Accord, T.S.C. Motor Freight Lines, Inc. v. United States* [14 FEDERAL CARRIERS CASES ¶81,336], 186 F.Supp. 777 (S.D. Tex 1960), *aff'd per curiam sub nom., Herrin Transp. Co. v. United States*, 336 U.S. 419 (1961)."

CONCLUSION AND PRAYER

For the foregoing reasons appellee submits that this appeal presents no substantial question warranting oral submission and full consideration. Therefore, the judgment of the District Court should be affirmed, and appellee so prays.

Respectfully submitted,

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PROOF OF SERVICE

I, Phillip Robinson, one of the attorneys for appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of December, 1967, I served copies of the foregoing Motion to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with air mail postage pre-

paid, to Hon. Ralph S. Spritzer, Acting Solicitor General, Department of Justice, Washington, D. C. 20530; to Hon. John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Ernest Morgan, United States Attorney, San Antonio, Texas 78200; and to Hon. Mario J. Martinez, Assistant United States Attorney, El Paso, Texas 79900.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and to Hon. Manny H. Smith, Attorney, Office of the General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for appellants herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Max G. Morgan, Attorney, 450 American National Building, Oklahoma City, Oklahoma 73102; Ronald R. Calhoun, Attorney, 608 Southwest National Building, El Paso, Texas 79901; Christopher & Bailey, T. S. Christopher, Attorney, 2413 Continental Life Building, Fort Worth, Texas 76102.

4. On the Attorneys for other appellees herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to David Axelrod, Attorney, Axelrod, Goodman & Steiner, 39 South LaSalle

Street, Chicago, Illinois 60603; and to Bruce Hallmark, Attorney, Goodman and Hallmark, Suite 13A, El Paso National Bank Building, El Paso, Texas 79901.

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